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Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

JOEL D. RUBIN et al., and JAMES D. ALEX, and JOSEPH RUBENSTEIN, et al.,
Plaintiffs-Petitioners,

vs.

U. N. INDUSTRIES, INC., et al.,
Defendants-Respondents.

JOINT ANSWER ON BEHALF OF THE RECEIVER AND THE PLAINTIFF'S CLASS-RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Seventh Circuit is accurately stated in the Supplemental Appendix. The district court's findings of facts and conclusions of law are included in the Appendix to this Answer.

JURISDICTIONAL STATEMENT

The Jurisdictional Statement of petitioner is well-stated. Respondents contest the statement of petitioners insofar as it purports to raise a question of any substance for this Court's consideration. No constitutional questions are raised by petitioners.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals properly affirm the district court's decision that the terms of the settlement agreement were fair and reasonable.

   a) in view of petitioners' claimed newly discovered evidence; and

   b) in view of petitioners' contention that the conveyance of oil leases by the Receiver should be rescinded?

2. Did the Court of Appeals properly affirm the district court's order modifying the class definition in this cause.

STATEMENT OF THE CASE

This is an action brought by shareholders of U.N. Industries, Inc. ("UNI"), a Utah corporation against defendants, including certain former officers, directors, major shareholders, and employees of UNI for alleged violations of the securities laws and other charges. Count I alleges a class action and Count II alleges a shareholders' derivative action. (Counsel for petitioners purport to sue on behalf of the shareholders as a class. Actually, counsel for petitioners is not class counsel and petitioners are but a few shareholders.) In due course, certain of the defendants proposed a settlement, the fairness of which was approved by the district court after notice and hearing. The district court entered Findings of Fact and Conclusions of Law which appear in the Appendix to this Answer. Petitioners objected to the settlement, and upon entry of the order approving the settlement, these defendants were dismissed and petitioners appealed.

By unanimous decision, the Court of Appeals affirmed the orders of the district court in all respects. (Pet. Supp. App., pp. 19-23).

SUMMARY OF THE ARGUMENT

It is the contention of respondents that the questions raised by petitioners here have been raised on many occasions in various Courts of Appeals decisions. The district court properly determined that the terms of the settlement of this class and derivative action as to certain defendants were fair and reasonable. The class necessarily was redefined in view of the antagonistic claims of the certain segments of the class as originally defined.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S DETERMINATION THAT THE TERMS OF THE SETTLEMENT OF THIS ACTION AS TO CERTAIN DEFENDANTS WERE FAIR AND REASONABLE.

A. The Purported Newly Discovered Evidence.

Petitioners contend that because of the discovery of "new evidence" (the telegram) the court should grant a hearing relative to a petition for rescission of certain reconveyances. Under Rule 60(b)(2) of the Federal Rules of Civil Procedure it is stated that:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:
>
> • • •
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).

The Receiver and class counsel assert that rescission under Rule 60(b)(2) cannot be sought successfully because no motion was made as required under Rule 60(b)(2); the facts of this case would not warrant a different finding on what otherwise would be "upon such terms as are just" (see argument *infra* as to why rescission is inappropriate); and the evidence was discovered long prior to the fairness hearing and, in any event, within the time in which a motion for a new trial could have been made (ten days after entry of judgment). Furthermore, the Rule also states that a motion made under subsection (b) does *not* affect the finality of a judgment or suspend its operation anyway.

The documents filed by petitioners show definitively that counsel for petitioners filed a Request for Admission directed to certain defendants concerning the letter and telegram which petitioners now designate as "newly discovered" evidence. The Request was filed on September 26, 1977, long prior to the fairness hearing. (See Pet. App., 15-17; paragraphs 2 and 4 of the Request.) There is no possible basis to petitioners' claim that the evidence was "newly discovered."

B. There Was No Basis For Rescission.

Petitioners contend that the court has a right to rescind on a petition being filed disclosing the discovery of the consummation of the sale and acknowledgements of the receipt of the telegram. Respondents respectfully submit that the Court should not at this time reverse the trial court's approval of the settlement offer for these or any other reasons advanced by Petitioners. Rescission is simply not a suitable remedy.

Rescission is a remedy well-recognized in American jurisprudence. It has, however, rather technical conditions precedent which at times make the remedy arduous for victims of alleged fraud and misrepresentation. For instance, as a general rule, a party to a contract who wishes to rescind must place the opposite party in *status quo*. *Van Koten* v. *Van Koten,* 323 Ill. 323, 154 N.E. 146 (1926); *Jockusch, Davison & Co.* v. *O. T. Lyon & Son,* 100 Tex. 594, 102 S.W. 396 (1907); Restatement of Contracts, sec. 349 (1932). Restoration of the consideration is a condition precedent on the theory that because rescission is basically an equitable remedy, a party "to a con-

tract cannot retain the consideration or a part of it and refuse to be bound by the contract or a part of it." *Babcock* v. *Farwell,* 245 Ill. 14, 39, 91 N.E. 683 (1910).

Some courts, particularly Illinois, have taken a hard view toward the return of consideration and have held that the "liability of the party to restore the consideration will not relieve him from the necessity of doing so, and it is sufficient to offer to set off the amount against what is claimed from the other party." *Babcock, supra,* 245 Ill. at 39. In recent years other jurisdictions have recognized a relaxation of this rule, reciting that the remedy is grounded in equity and holding that the "restoration" principle is not absolute and is not to be strictly construed where restoration is impossible, *Delta Investing Corp.* v. *Moore,* 366 F.2d 516 (6th Cir. 1966), or phrased differently, consideration received is to be returned by the party seeking to disaffirm insofar as it lies within his power to do so. *Howard* v. *Howard,* 122 Vt. 27, 163 A.2d 861 (1960); *Delta Investing Corp.* v. *Moore, supra.*

It would be impossible to return the parties to the *status quo* after 8 years delay. The leases were developed by BSW and Mosser. BSW after a period of time was able to recoup its lien on the leases and eventually the problems between Mosser and BSW were refinanced by the Bank of Alice which holds liens on the leases now pending. (12-15-78 Tr. 45). The return of $75,000.00 to place the parties in *status quo* is insufficient. UNI would also be required to comply with its agreed consideration of several millions of dollars under the terms of the Mosser-UNI agreement.

In addition, rescission would require actual litigation of this case and not settlement (12-15-78 Tr. 44). Rescission is a remedy that is derived after evidence is presented. All the defendants who are involved in the rescission remedy have resisted the contention forcefully. In the last analysis, there are no grounds for rescission. At best, as Dawson conceded, both Mosser and UNI contended the other had breached contract obligations and had actually filed suit against the other. (12-20-78 Tr. 36-41). Furthermore, it makes little sense to consider rescission in place of the settlement proposal of BSW and FRB. Because the leases now belong to Mosser, the remedy of rescission or breach of contract could only apply to him. The dangers inherent in the remedy against Mosser, however, are substantial even if liability were established.

Finally, the district court emphasized that rescission could adversely affect the interests of third parties who are entirely innocent of any misconduct. Also, there is substantial evidence that rescission at the present time would affect only three producing oil wells. There are significant reasons, supported by strong evidence, to support the district court's finding that the possible application of the remedy of rescission is not a sufficient basis to disapprove the settlement offer.

The Court of Appeals considered all the foregoing contentions and explicitly rejected them in its Opinion. (Supp. App. 22). Respondents submit that this determination is irrefutable.

II. THERE WAS NO ERROR IN THE REDEFINITION OF THE CLASS.

1. Reasons For The Redefinition.

Following the filing of a Joint Report on May 31, 1977, it was the opinion of the class counsel that there were serious inherent conflicts within the class originally certified, to-wit: "all shareholders of UN Industries, Inc." The only class without inherent conflicts was "All persons who purchased free tradeable shares of stock of UNI on the over-the-counter market through a broker-dealer during the period from July 1, 1968 to and including December 26, 1969." The district court certified the class as such.

Within the original class there were three sub-classes of UNI shareholders who required separate consideration because their interests were either unsupportable or antagonistic to a substantial number of other members within the proposed class. The sub-classes are definable as follows:

(1) Those who acquired their UNI shares prior to July 1, 1968.

July 1, 1968 was the earliest date that any of the defendants committed any wrongful act as alleged in the Fourth Amended Complaint. Those who bought or sold prior to this time were not buyers or sellers who can recover under Rule 10-5 and other pertinent statutes.

(2) Those who acquired their UNI shares subsequent to December 26, 1969.

On or about December 11, 1969, the S.E.C. filed suit against UNI, Charles Oughton, Paul Dawson, Frank Greene, and Harry Mosser. The S.E.C.

raised many of the same allegations asserted in this action. The lawsuit received wide publicity. Any purchaser of UNI stock within a reasonable period thereafter would very probably have acquired it with actual or constructive notice of defendants' fraudulent conduct and defendants could raise that as a defense.

(3) Those who purchased lettered or legended UNI stock at any time.

It was the position of the Receiver that these securities were improperly purchased because they had not been registered as required by law and were either acquired for very low, speculative amounts or were acquired through the defendant Paul Dawson and others. It was the judgment of class counsel that the Receiver's contention in this respect had merit and deserved the court's consideration.

2. Redefinition Of The Class Does Not In Any Event Preclude Valid Claims.

Petitioners may nevertheless substantiate their claims, contrary to what they contend in their Petition. There was no attempt, desire, or intention in redefining the class to deprive anyone from any right or interest of any kind. Shareholders in the above three sub-classes are not left remediless or bereft of any ability to obtain legal representation. The district court has not foreclosed anyone from suing or presenting a claim. It specifically held that *any* stockholder or group of stockholders could present evidence that they had a Rule 10(b)(5) case as to their purchases of UNI stock; that the court preserved the right of any shareholder or group who desired to be included in the class to present evidence at an appropriate

time that he or they purchased shares either before or after the date specified in the class definition at prices artificially inflated as a result of the alleged wrongful conduct of the defendants; and that any shareholder who is able to prove to the court that he suffered damages as a result of the theories of liability alleged in Count I, other than damages sustained generally by the corporation as asserted in the settlement proceeds.

Again, the Court of Appeals expressly considered this contention and rejected it, holding that "the district court's decision to limit membership in the class as described above was fair and reasonable to all involved." (Supp.App. 21). No reasonable person could disagree with this statement.

CONCLUSION

For the reasons given, respondents respectfully state that there is no reason, and certainly no compelling reason for review of this case, and pray that this Court accordingly deny the petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

IN THE

UNITED STATES DISTRICT COURT

For The Northern District Of Illinois

Eastern Division

No. 70 C 189
JOEL D. RUBIN, et al.,

Plaintiffs,

vs.

U. N. INDUSTRIES, INC., etc., et al.,

Defendants.

(Consolidated with Nos. 70 C 336 and 70 C 349)

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING SETTLEMENT PROPOSAL OF CERTAIN DEFENDANTS

The initial cause of action in this consolidated class action was filed on January 27, 1970. By March 10, 1970, two other actions had been filed which involved similarly situated plaintiffs charging virtually identical wrongful conduct by the same defendants. These were the *Rubin* case (70 C 189), the *Ansani* case (70 C 336), and the *Bassi* case (70 C 349). On March 2, 1970, Peter v. Fazio was appointed Receiver of UNI by Order of this court and William Henning Rubin was appointed to act as attorney for the Receiver. On March 10, 1970, the Honorable William J. Lynch, before whom the cases were then pending, consolidated the said causes and on January 5, 1971, ordered that the consolidated cases thereafter would be collectively described as "the consolidated action". The court thereafter determined that the consolidated action was to proceed as a class action; defined the class as "all

shareholders of U. N. Industries, Inc.''; directed that appropriate notice be given to all members of the class; and appointed class counsel.

In due course, the ordered notice was given to the class. (The class was later redefined by court order.) The complaint was amended on several occasions, the last in time being the Fourth Amended Complaint, verified by William Henning Rubin, and filed on or about February 19, 1974. This complaint is brought in two counts, the first as a class action by UNI shareholders for damages and the second as a derivative action on behalf of UNI. UNI also filed a crossclaim against all defendants except UNI.

The Fourth Amended Complaint and the crossclaim allege that the defendants violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78(j)(b), and the Rules and Regulations promulgated by the Securities and Exchange Commission and Section 17(a) of the Securities Act of 1934, 15 U.S.C. §77(g)(a), as well as certain common law principles.

Among the defendants joined were The Bank of the Southwest National Association; Houston (hereafter ''BSW''); A. G. McNeese, Jr. (hereafter ''McNeesee''); Harry J. Mosser, Suzanne Mosser and Harry J. Mosser, Jr. (hereafter collectively ''Mosser''); and Financial Relations Board, Inc. (hereafter ''FRB'').

During May, 1978, after extended negotiations, the defendants BSW, McNeese, Mosser and FRB tendered a proposed settlement to resolve the claims of the class members and UNI as alleged in the Fourth Amended Complaint. Pursuant to order of this court, notice of the proposed settlement of said defendants and of the hearing with respect thereto, in the form approved by this court, was mailed to all shareholders of record of UNI and to all class members on November 11, 1978. There was also published in the National Edition of the Wall Street Journal on November 6, 13 and 20, 1978, pursuant

to order of this court, a notice of the proposed settlement and of the hearing with respect thereto. After such notices to all class members and to all other shareholders of UNI, and wherein time was allowed for all shareholders of UNI, class members and other interested persons to object to or otherwise comment upon the propriety of the proposed settlement, the court conducted a hearing on the fairness of the settlement and objections filed thereto on December 15, 1978.

On the basis of its consideration of the record before it, the court enters the following findings of fact and conclusions of law.

Findings of Fact

Terms of Proposed Settlement

1. The proposed settlement provides that in settlement and compromise of all claims and causes of action pending against them:

(a) BSW and McNeese will pay to the Receiver $350,000.00 in cash and McNeese will assign and transfer to the Receiver 50,000 shares of UNI legend stock now registered in his name.

(b) Harry J. Mosser, Suzanne Mosser and Harry J. Mosser, Jr., will pay to the Receiver $350,000.00 in cash.

(c) FRB will pay to the Receiver $85,000.00 in cash and cause its judgment outstanding against UNI in the original amount of $14,866.21 to be satisfied and discharged in full.

The proposed settlement offers of said defendants are conditioned upon court approval of the settlement, dismissal on the merits with prejudice of said defendants from the pending proceedings, execution and delivery of a covenant not to sue said respective defendants by the Receiver on behalf of UNI, and an order barring any further claims or actions by members of the plaintiff class

against said defendants as a result of which the members of the plaintiff class and UNI would be permanently barred and enjoined from asserting any and all claims, demands, or causes of action whether individual, derivative or class, legal or equitable, against said defendants.

Upon court approval of the settlement, defendants Mosser and McNeese have each agreed to deposit, or cause to be deposited with the Receiver or as the court may otherwise direct, the sum of $350,000.00 cash or a cash equivalent, such as a certificate of deposit, a letter of bank guaranty, or other acceptable collateral, which shall be interest bearing, upon condition that if the settlement is reversed on appeal, then said sums shall be returned to defendants Mosser and McNeesse with said interest, but if affirmed on appeal, or no appeal is filed with respect to said settlement, said sums together with the interest thereon shall become the property of the Receiver to be disbursed as the court directs.

Defendant FRB will pay the sum of $85,000.00, and execute a waiver of its judgment on the first day subsequent to the date when the judgment approving the settlement as to FRB and dismissing the action on the merits with prejudice to the Receiver, the plaintiffs and the class as against FRB has become final and (i) the time for appeal has expired or (ii) the judgment is affirmed on appeal and the time for filing a further appeal has expired.

Support for the Settlement

2. One factor considered by the courts in evaluating the fairness of a proposed class action settlement is the degree of support for, as well as opposition to, the settlement. Of approximately 2,463 shareholders of UNI, only three shareholders submitted written objections pursuant to the notices sent to all shareholders and as published in the National Edition of the Wall Street Journal. Joseph Rubenstein, Robert Kaplan and Sam Baldali, respectively,

claim to be the owners of approximately 540,000, 268,000 and 100,500 shares of UNI stock. None testified in opposition to the settlement at the hearing. The only other objection was filed by Attorney William Henning Rubin on behalf of his clients who are members of the class, Joel D. Rubin and Alan Stengel, and also purportedly on behalf of other stockholders not members of the class. The failure of either the overwhelming majority of the shareholders of UNI or the members of the plaintiff class to object to the proposed settlement strongly indicates extensive support for the settlement.

The probability of Success or Failure of a Trial on the Merits

3. Without prejudging in any way the issues joined in this proceeding, the court is concerned with the probability of success of the plaintiffs in the event the case were tried on the merits. All settling defendants have resisted liability vigorously and are represented by capable and competent counsel. Class counsel and counsel for the Receiver have advised the court that the case against BSW and McNeese is fraught with difficult legal and factual problems, a conclusion with which the court agrees. Essentially, the case centers on certain alleged material misrepresentations relative to the lien rights of BSW at the time of the assignment of certain oil leases by the Receiver, with court approval, in January, 1971. As stated by counsel for BSW, there is substantial evidence in contemporaneous writings that there were no such material misrepresentations.

The plaintiff's case against Mosser on the issue of liability is described as good, yet Mosser's counsel presents strong argument that Mosser is the person who has suffered the most as a result of the UNI stock fraud and points out that UNI, in failing to honor its agreements, has caused him to incur very substantial damages. However, the most significant factor supporting Mosser's settlement is his inability to respond in damages to any

judgment that might be entered against him in this proceeding.

The plaintiffs' case against FRB on the issue of liability is described as good, by plaintiffs' counsel, a conclusion resisted strenuously by counsel for FRB. The significant factor supporting FRB's settlement, however, is its inability to respond in damages to any judgment that might be entered against it in this proceeding.

The Ability to Pay of the Settling Defendants

4. Of significant concern to the court is the evidence of the possible inability of certain settling defendants to satisfy a judgment award in the event this case proceeded to trial. Class counsel and counsel for the Receiver have carried out extensive discovery into the financial condition of Mosser and FRB, and there is a significant question whether sufficient assets, if any, would remain to satisfy a judgment award entered against either Mosser or FRB. Substantial actual and contingent claims or liens have been asserted against Mosser, by governmental agencies and the Bank of Alice, Texas, which could very well exhaust his entire assets as well as any assets controlled by him. The offer of FRB represents more than half its total net worth.

Conduct of Negotiations

5. Tne negotiations leading to the proposed settlement have been made at arms length, have been protracted with a give and take by all parties concerned, have led to several proposals which were rejected by class counsel, the Receiver and the Receiver's counsel, and have been undertaken and carried out with the knowledge and approval of this court.

Complexity and Length of the Litigation

6. The proposed settlement offers by the setting defendants have been stated to be the final offers of these

defendants prior to trial. The issues raised in the Fourth Amended Complaint are complex and their litigation will be protracted. All the settling defendants are prepared to litigate the issues vigorously. All are represented by capable, competent counsel. The issues cannot be resolved in one trial because the issues as to BSW, pursuant to order of this court, have been severed and can only be litigated in the United States District Court for the Southern District of Texas, Houston Division. The court finds that the litigation in both trials will be lengthy, protracted, complex and expensive and, because of the difficult issues of fact and law involved, the outcome in either case cannot be predicted with any degree of certainty.

The Conduct of Class Counsel, the Receiver and the Receiver's Counsel

7. Attorney William Henning Rubin has included among his objections, alleged misconduct of class counsel, the Receiver and the Receiver's counsel. These allegations were made in prior proceedings before this court, and the court has ruled them to be without merit. The court again finds these allegations to be without any foundation in fact. The receiver, an attorney of superior reputation in the community, has forthrightly conducted his obligations and responsibilities with unusual diligence, perseverance and thoroughness, as has his counsel. The court notes specifically that notwithstanding the statements questioning his integrity, the Receiver has given attorney Rubin and persons he purportedly represents, as well as the shareholders of UNI and other interested persons, repeated opportunity to advance a plan of reorganization or means of refinancing UNI and its oil properties but without any meaningful or practicable response having been submitted to the Receiver for presentation to this court.

The plaintiff class is represented by competent, experienced attorneys who have performed their responsibilities in the highest professional manner.

The Remedy of Rescission

8. The principal objection advanced by the objectors to the proposed settlement is that remedy of rescission (in the form of a "petition to rescind the sale" by attorney Rubin) is an appropriate remedy to overturn the reassignment of oil leases by the Receiver, and which was approved by this court on June 30, 1971. Their principal contention is that there were misrepresentations of material facts relative to the lien interest of BSW in the oil leases and as to an "anticipation" of consent by BSW to a participation in 25% of the production runs of the oil leases. The court has considered the "petition to rescind the sale" as a suggested remedy under the Fourth Amended Complaint against the defendants Mosser, McNesse and BSW, and thus as a possible alternative to the proposed settlement. However, these defendants have denied any such misrepresentations and have raised substantial defenses to a remedy of rescission. It is a virtual impossibility that the *status quo* can be re-established even if $75,000.00 (the amount paid to the Receiver of UNI upon reconveyance of the oil properties and release of the proceeds from the oil production therefor) were to be returned to said defendants. Rescission could adversely affect the interests of third parties who are entirely innocent of any misconduct. Rescission may not affect BSW and the money it has obtained in satisfaction of the indebtedness of Mosser to it and in release of its liens securing said indebtedness. Finally, there is substantial evidence by said defendants that rescission would affect at the present time only three producing oil wells. The court finds that the possible application of the remedy of rescission does not constitute a sufficient basis in fact or law to disapprove the proposed settlement offered by the settling defendants.

The Redefinition of the Class

9. On May 31, 1977, class counsel and the Receiver filed a Joint Report to the court wherein it was indicated that

there might be antagonistic interests between segments of the class as certified by the court. Accordingly, on December 2, 1977, class counsel caused a motion to be filed to modify the class definition. Following notice to all affected shareholders of UNI and a hearing, the class was redefined by this court by order entered on March 21, 1978, to include the following:

> "All persons who purchased free, tradeable shares of stock of U. N. Industries, Inc., on the over-the-counter market through a broker-dealer during the period from July 1, 1968, to and including December 26, 1969."

Pursuant to the order entered on March 21, 1978, the court preserved the right of any shareholder or group of shareholders of UNI who desire to be included in the class to present evidence at an appropriate time that he or they purchased shares either before or after the dates specified in the class definition at prices artifically inflated as a result of the alleged wrongful conduct of the defendants. Accordingly, the court confirms and finds that any shareholder of UNI who is able to prove to the court that said shareholder suffered damages as a result of the theories of liability alleged in Count I, other than the damages sustained generally by the corporation as asserted in the derivative action alleged in Count II, said shareholder shall participate in the settlement proceeds allocated to the plaintiffs in Count I of the Fourth Amended Complaint.

Allocation of Settlement Proceeds

10. The court finds that the allocation of the settlement proceeds, namely, two-third thereof or $523,334.00 with respect to the issues pleaded in Count I and one-third or $261,666.00 with respect to the issues pleaded in Count II, as proposed by class counsel and the Receiver is fair and reasonable and is hereby approved.

Other Objections

11. Any and all other objections which have been made and are not explicitly addressed in these findings, have been fully considered by the court, together with the objections discussed above; the court regards them individually and collectively as insufficient to cast doubt on the adequacy and fairness of the proposed settlement.

Fairness of Proposed Settlement

12. The court finds that the proposed settlement is fair, reasonable and adequate and is in the best interests of the members of the plaintiff class and the interests of UNI.

Conclusions of Law

1. The court has jurisdiction over the subject matter and personal jurisdiction over the parties;

2. The court determines that the proponents of the proposed settlement have met their burden of persuading the court that the settlement is fair, reasonable, and adequate, notwithstanding the objections presented to it;

3. The "petition to rescind the sale" and all other objections to the proposed settlement are insufficient as a matter of law and are hereby denied.

ENTER:

United States District Judge

DATED: December 22, 1978.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NO. 70 C 189

(Consolidated with No. 70 C 336 and 70 C 349)

JOEL D. RUBIN, et al.,

Plaintiffs,

vs.

U. N. INDUSTRIES, INC., etc., et al.,

Defendants.

ORDER APPROVING SETTLEMENT

Pursuant to Findings of Fact and Conclusion of Law entered this day, the court hereby orders that:

1. The settlement proposed by the defendants, The Bank of the Southwest National Association, Houston, A. G. McNesse, Jr., Harry J. Mosser, Suzanne Mosser, Harry J. Mosser, Jr., and Financial Relations Board, Inc. (hereafter "Settling Defendants"), of the claim and causes of action in Counts I and II of the Fourth Amended Complaint is determined to be fair, reasonable and adequate and is hereby approved by the court. The "petition to rescind the sale" filed by the attorney William Henning Rubin is hereby denied.

2. The action on behalf of the plaintiffs' class in Count I and the plaintiffs in Count II is hereby dismissed as to the Settling Defendants, The Bank of the Southwest National Association, Houston, A. G. McNeese, Jr., Harry J. Mosser, Suzanne Mosser and Harry J. Mosser, Jr., and Financial Relations Board, Inc., with prejudice.

3. The Receiver be, and he hereby is, directed to prepare, execute and deliver on behalf of UNI a covenant not to sue the Settling Defendants in appropriate form.

4. Any further claims or actions by members of the plaintiff class against the Settling Defendants are perm-

anently barred and the members of said class are enjoined from asserting any and all claims, demands, or causes of actions, whether individual, derivative or class, legal or equitable, against the Settling Defendants.

5. The court hereby directs that the settlement proceeds be allocated as follows: two-third thereof or $523,-334. to the members of the plaintiff class in accordance with the allegations pleaded in Count I of the Fourth Amended Complaint, and one-third thereof or $261,666. to the Receiver on behalf of U. N. Industries, Inc., in accordance with the derivative allegations pleaded in Count II of the Fourth Amended Complaint.

6. Class counsel and the Receiver are directed to prepare, execute and deliver the appropriate documents necessary to effectuate the settlement of this cause with the Settling Defendants.

7. The court retains jurisdiction of this action as to the Settling Defendants to supervise implementation of the settlement and retains jurisdiction as to the balance of the defendants who remain in this suit.

8. The court finds, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure as to the final order approving the settlement and dismissing the defendants, The Bank of the Southwest National Association, Houston, A. G. McNeese, Jr., Harry J. Mosser, Suzanne Mosser, Harry J. Mosser, Jr., and Financial Relations Board, Inc., that there is no just reason to delay enforcement or appeal from the said order.

ENTER:

United States District Judge

DATED: December 22, 1978.